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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA ON THE RELATION OF Arthur Kassin, petitioner

v.

RAYMOND J. MULLIGAN, UNITED STATES MARSHAL for the Southern District of New York, and Garrett W. Cotter, United States Commissioner for the Southern District of New York

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT, RAYMOND J. MULLIGAN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK[1]

OPINIONS BELOW

The memorandum opinion of the District Court (R. 158–159) has not been reported. The per curiam opinion of the Circuit Court of Appeals (R. 166–168) is reported in 73 F. (2d) 274.

[1] The only relief prayed against the United States Commissioner was that a writ of certiorari be issued directing him to certify to the District Court the indictment, testi-

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1934 (R. 168–169). The petition for a writ of certiorari was filed in this Court December 10, 1934, and granted on January 14, 1935 (R. 169). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Where a United States Commissioner has found in a removal proceeding that there was probable cause to believe the defendant guilty of the offense or offenses charged in the indictment and has ordered his commitment for removal, whether in an appeal taken in a habeas corpus proceeding to prevent removal a Circuit Court of Appeals is required to weigh the evidence before the Commissioner for the purpose of determining whether it would reach a different result, the defendant not having established by unimpeachable testimony that the decision of the Commissioner was arbitrary or capricious.

(2) Whether, if the evidence may be weighed, there was a sufficient showing of probable cause in the instant case.

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mony, etc., upon which he acted in directing that the petitioner be committed for removal (R. 7). The writ issued (R. 8–9), and the United States Commissioner complied with its requirements in his return (R. 12). He has, therefore, no further interest in the proceeding, and consequently no brief is necessary on his behalf.

(3) Whether the Commissioner committed such error in receiving and considering the rebuttal testimony of Special Agent Main as entitles the petitioner to his discharge on *habeas corpus*.

STATUTES INVOLVED

The pertinent statutory provisions are copied in Appendix A, *infra* (pp. 46–48).

STATEMENT

An indictment in 18 counts was returned against the petitioner and others in the District Court of the United States for the Southern District of Florida on January 28, 1933 (R. 13–37). The first count of the indictment (R. 13–15) charged that one Julius L. Chadwick, an employee of the Florida National Bank of Jacksonville, Florida, which was a member bank of the Federal Reserve system, conspired with the petitioner and the other defendants continuously from November 1, 1931, to May 13, 1932, to misapply the bank's funds by converting to the use of the defendants the moneys, funds, and credits of the bank by means of forged checks to the amount of $131,426.00, drawn upon the account of a depositor in the bank, in violation of R. S. § 5209, as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C., Title 12, § 592; Appendix A, *infra* (pp. 46–48). This count alleged (R. 15) that "in pursuance of said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the pur-

pose of effecting and accomplishing the object thereof", the defendants committed various overt acts, among which were the following performed by the petitioner (R. 18):

> 15. On, to wit, the 1st day of April, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, proceeded to Jacksonville, Florida, and registered at the George Washington Hotel, Jacksonville, Florida, under the name of Arthur Stern, Philadelphia, Penna.
>
> 16. On, to wit, the 24th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Casa Marina Hotel, Jacksonville Beach, Florida, under the name of Arthur Starke, Washington, D. C.
>
> 17. On, to wit, the 27th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Monson Hotel, St. Augustine, Florida, as Arthur Starke, Washington, D. C.
>
> 18. On, to wit, the 30th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, under the name of Arthur Starke, rented a safe deposit box at

the St. Augustine National Bank, St. Augustine, Florida.

The other counts of the indictment charged Chadwick with misapplying the funds of the bank and with making certain false entries in statements and books of the bank, in violation of R. S., § 5209, as amended. The petitioner and the other defendants were charged as aiders and abetters in the commission of these offenses (R. 19–37).

On April 4, 1933, the petitioner was taken into custody in the Southern District of New York and arraigned before a United States Commissioner on a complaint filed by a Special Agent of the Department of Justice, alleging that the petitioner was one of the defendants named in the above indictment and praying that an order be entered directing the removal of the petitioner to the Southern District of Florida (R. 2). Petitioner was enlarged upon bail pending determination of the removal proceeding (R. 2), and five hearings were held before the United States Commissioner between May 16, 1933, and June 19, 1934 (R. 37, 57, 66, 68, 87).

To establish probable cause the Government introduced a certified copy of the indictment and the testimony of two witnesses, MacDonnell [2] and Zapf, who proved that the petitioner had committed overt acts Nos. 16 and 18 charged in the conspiracy

[2] MacDonnell had testified before the grand jury and identified the petitioner as the person against whom he testified (R. 39–42, 56).

count of the indictment, i. e., that on April 24, 1932, the petitioner had registered at a hotel at Jacksonville Beach, Florida, under an alias, and that on April 30, 1932, he rented a safe deposit box under an alias in a bank in St. Augustine, Florida (which was opened by him several times).

To controvert the Government's showing, the petitioner took the stand. He admitted his presence in Florida and that he had registered at the Jacksonville Beach hotel and rented a safe deposit box at the St. Augustine National Bank as charged, but attempted to explain these matters. He also attempted to explain his use of an alias while in Florida, but this explanation was unintelligible. In addition to his own testimony and that of his wife offered in corroboration, the petitioner introduced the depositions of five witnesses who were then undergoing sentence under the instant and other indictments for their part in the misapplication of the funds of the Florida National Bank. These witnesses attempted to exonerate the petitioner of the offenses charged, but their testimony revealed either that they did not know all the participants, that transactions could have been had by other participants with the petitioner without their knowledge, or that while they were willing to aid the petitioner they were loath to give any details by which the credibility of their testimony could be gaged.

To rebut this testimony the Government recalled the witness MacDonnell, who testified that on one occasion he saw the petitioner enter the St. Au-

gustine National Bank in the company of one Goldberg, whose participation in the conspiracy charged is indisputable. Both the petitioner and Goldberg had safe deposit boxes at the bank, but petitioner denied any acquaintance with Goldberg. In addition the Government placed on the stand Roger L. Main, a Special Agent of the Department of Justice, who had investigated the case. He stated that two of those whose depositions were offered in favor of the petitioner (Dickson and David N. Chadwick) had made contradictory statements to him prior to their depositions and that after they had made these depositions they told him in effect that they had lied therein. Without going into detail it suffices to say that these statements not only implicated petitioner in the conspiracy, but that one of them disclosed him as the prime mover therein. Main's testimony was objected to on the ground that proper foundation had not been laid for its admission. We have not attempted at this point to give anything more than a synopsis of the testimony, but we have for the convenience of the Court summarized it adequately in Appendix B, *infra* pp. 49–65, to which reference will from time to time be made.

After hearing the testimony and after giving each side opportunity to submit briefs (R. 128), the Commissioner made the following findings (R. 12):

> from the above-mentioned testimony and exhibits I found the petitioner was the identical person mentioned in the indict-

> ment. I found further that there was probable cause to believe that he committed the offense with which he is charged. I further found that the indictment charged an offense against the United States and that the Court of the District to which removal was sought has jurisdiction to try the petitioner for the offense charged.

Accordingly, on June 25, 1934, he ordered the petitioner committed to the custody of the United States Marshal for removal to the Southern District of Florida (R. 10–11).

On June 29, 1934, the petitioner filed in the District Court of the United States for the Southern District of New York a petition denying that the Government had shown probable cause to believe that he was guilty of the offenses charged in the indictment and alleging that his removal to the Southern District of Florida would, therefore, be unwarranted. This petition also alleged that the testimony of Special Agent Main was incompetent and prejudicial and was elicited in violation of his constitutional rights. The petition prayed that a writ of habeas corpus be issued, directed to the Marshal, and that a writ of certiorari be issued, directed to the United States Commissioner (R. 1–7). These two writs issued (R. 8–9) and returns were filed by the Marshal and Commissioner (R. 10–12).

No additional testimony was taken in the District Court upon the question of probable cause. In that court the Government contended that the is-

sues presented were raised on the same evidence as in the recent case of *Jerihem Seeman*, jointly indicted with petitioner, in which case the court had decided that the removal was proper.[1]

The court stated, however, that a comparison of the records in the two cases showed a substantial distinction; that in the *Seeman* case the court refused to accept and consider depositions secured from certain other defendants jointly indicted, whereas in the instant case these depositions were not only considered by the Commissioner, but subsequent thereto the Government was permitted to call as a witness Special Agent Main, who testified to conflicting statements made by two of the witnesses before and after the depositions were taken. After stating that the propriety of the reception of Main's testimony had been challenged and that the court had for that reason "reviewed the evidence in detail," the court said (R. 159):

> While I do not believe that the Commissioner is held to the same rigid rule as would be applicable upon the trial of the indictment (*Hughes* v. *Gault*, 271 U. S. 142), the evidence in this case satisfies me that the Commissioner would have been amply justified in making the order of removal even

[1] In the *Seeman case* the decision of the District Court was affirmed *per curiam* without opinion by the Circuit Court of Appeals for the Second Circuit (69 F. (2d) 1022), and on June 4, 1934, this Court denied a petition for writ of certiorari (No. 1023, last term; 292 U. S. 654).

had he not admitted, or disregarded, the testimony of the witness Main.

The court accordingly ordered that the writ of habeas corpus be dismissed and the petitioner remanded to the custody of the Marshal (R. 159–160).

On appeal (R. 160–164) the Circuit Court of Appeals for the Second Circuit unanimously affirmed the order below. As we interpret that opinion the court held that as the Commissioner had received and considered all the relevant evidence which the accused had introduced, it was not required on an appeal in a habeas corpus proceeding to prevent removal to review the evidence for the purpose of determining whether it would reach a different conclusion; that it could only interfere if the indictment appeared "so overwhelmingly unjustified as to show that thongh the Commissioner has pretended to hear the defence, he has not really done so" (R. 166–167). By reference to its prior decision in *United States ex rel. Scharlon* v. *Pulver*, 54 F. (2d) 261, it is evident that the arbitrary action of a Commissioner to which the court had reference comprehended a situation where the Commissioner ordered commitment for removal in the face of incontrovertible testimony showing that it was impossible for the accused to have committed the offense charged. An instance of such arbitrary action was given by the court in the *Scharlon* case as follows (p. 264):

> * * * Suppose for example that he [the accused] could prove by unimpeachable

> contemporaneous documents that at the time charged he was physically incapable of committing the crime, as for example, that he was in a hospital recovering from an operation. No commissioner who rationally considered such evidence at all, could fail to discharge him. True, on review we should be passing on the cogency of the proof; not however to decide merely that there was no evidence of probable cause, but that the accused had been denied a rational hearing. * * *

Concerning the admissibility of Special Agent Main's testimony, the court made no reference to the contradictory statements of Dickson and Chadwick which were made *after* their depositions were taken. As the court said (R. 167) that "as the prosecution apparently already knew the contradictions at the time of the cross-examination" of these witnesses by the Government when their depositions were taken, it evidently had in mind only the contradictory statements made by Chadwick and Dickson before their depositions were taken. The court held that because Dickson and Chadwick were not asked during their cross-examination by the Government whether they had made contradictory statements, the ground had not been prepared for the admission of this testimony and that it was therefore incompetent. It said, however, that while the Commissioner had thus considered evidence which strictly he should not have heard, it

was not disposed to require him to reconsider his decision for the following reasons (R. 167–168):

> * * * There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in court. *U. S.* v. *Green,* 108 F. R. 816, 819, 820; *U. S.* v. *Kallas,* 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in *U. S. ex rel. Hughes* v. *Gault, supra* (271 U. S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradiction and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings.

ARGUMENT

I

THE COMMISSIONER'S FINDING OF PROBABLE CAUSE WAS NOT ARBITRARY OR CAPRICIOUS AND, THEREFORE, SHOULD BE UPHELD

There is no question presented here as to the sufficiency of the indictment to charge an offense within the jurisdiction of the court of the demand-

ing district, or as to the identity of the petitioner as one of those named as a defendant in the indictment. The only question involved is whether the Government's showing of probable cause was sufficient on habeas corpus to uphold the action of the Commissioner in committing the petitioner for removal.

The position of the petitioner apparently is that the Government introduced no evidence having any probative value with reference to probable cause except the indictment, and that the effect of that as evidence of probable cause was swept away by the evidence introduced by the petitioner and his witnesses to show innocence. While we disagree with the petitioner's appraisal of the weight of the evidence for and against probable cause, the court below did not find it necessary, correctly, we think, to attempt to weigh the evidence because of its conception of the scope of its review in a proceeding such as that before it. It said (R. 166–167):

> * * * We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The first question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause, *Tinsley* v. *Treat*, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evidence which the accused chooses to bring in; and no doubt his judgment must be his own, based upon all the evidence before him, though the indictment

> is necessarily hearsay. But we decided, after as careful consideration as we could give it, in *U. S. ex rel. Scharlon* v. *Pulver*, 54 Fed. (2d) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers; we did not commit ourselves to the sufficiency of a mere ritual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defence, he has not really done so. Such cases will be very rare; this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. *U. S. ex rel. Kohl* v. *Mulligan*, 54 Fed. (2) 1085; *U. S. ex rel. Pugliese* v. *Pulver*, 61 Fed. (2) 1044; *U. S. ex rel. Frank* v. *Mulligan*, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread *U. S. ex rel. Hughes* v. *Gault*, 271 U. S. 142. Such appeals are therefore ordinarily fruitless.

This statement is but an epitome of the views of the court so carefully expressed in its previous decision in the *Scharlon case*. In the opinion in that case the opposing viewpoints with respect to the scope of review on habeas corpus to prevent

removal are, we think, so admirably stated as to justify extensive quotation therefrom. After stating the facts in the case, the court said (pp. 263–264):

> There is unquestionably much confusion in the books as to what is open for review upon such proceedings. While it is uniformly held that the indictment makes a prima facie case, what that means is not always clear. It may be no more than to establish a legal presumption of probable cause; on the other hand, it may itself constitute evidence of that fact. Very different consequences follow from these two views, pursued to their conclusions. A true presumption is not evidence, though it supplies its place and requires the other party to proceed with the negative. Unless he does, he loses; when he does, the presumption is out of the case, and the issue is open. On this view, therefore, as soon as the accused puts in any proof, except possibly a bare denial—the equivalent of a plea of not guilty—the indictment disappears, the prosecution must proceed with evidence of probable cause, and the commissioner must decide only between the evidence in denial and the rebuttal. This we understand to be the doctrine laid down in *Meehan* v. *U. S.*, 11 F. (2d) 847 (C. C. A. 6), and *Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9).
>
> The other view results practically in circumscribing the writ to an examination of the regularity of the proceeding; that is,

as to whether the commissioner allowed the accused proper latitude in presenting his case, and really considered his proof. If he has done so, his conclusion as to the existence of probable cause is irreviewable, and the evidence in rebuttal is never important except insofar as he might without it have found the evidence of the accused persuasive. If the prosecution chooses to take the chance that the indictment alone will satisfy him, it will always be safe on habeas corpus. Perhaps the judge who orders the removal may think otherwise, but that is a different question. All this necessarily follows from the well-settled rule that in such cases—which are only a species of habeas corpus in general—the writ does not search the correctness of the conclusion as matter of fact. It only examines whether there was any evidence which could justify the finding of probable cause. *Oteiza* v. *Jacobus,* 136 U. S. 330, 10 S. Ct. 1031, 34 L. Ed. 464; *Bryant* v. *U. S.,* 167 U. S. 104, 17 S. Ct. 744, 42 L. Ed. 94; *Hyde* v. *Shine,* 199 U. S. 62, 84, 25 S. Ct. 760, 50 L. Ed. 90; *Price* v. *Henkel,* 216 U. S. 488, 30 S. Ct. 257, 54 L. Ed. 581; *Rodman* v. *Pothier,* 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759; *United States ex rel. Hughes* v. *Gault,* 271 U. S. 142, 46 S. Ct. 459, 70 L. Ed. 875. Once it be conceded that the indictment is itself evidence, the testimony of the accused can meet it only as proof against proof, and it will be alone enough to support the finding. The

rebuttal is only cumulative, and it is never necessary to consider it upon habeas corpus.

As there is no middle ground, except as we shall try to show later, we must choose between these two. Any decision would test the question which supported a removal, where at once the accused put in more than formal evidence in denial, and the prosecution proved nothing in rebuttal, for such a ruling is obviously inconsistent with the notion that the indictment is only a presumption. There are a number of cases, where, so far as appears, both conditions existed. *Beavers* v. *Haubert*, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950; *Hyde* v. *Shine*, 199 U. S. 62, 84, 25 S. Ct. 760, 50 L. Ed. 90; *Price* v. *Henkel*, 216 U. S. 488, 30 S. Ct. 257, 54 L. Ed. 581; *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142, 46 S. Ct. 459, 70 L. Ed. 875; *Magnus* v. *Keville*, 6 F. (2d) 157 (C. C. A. 1); *Burton* v. *Smithers*, 31 F. (2d) 966 (C. C. A. 4). None of these was correctly decided if the first doctrine be law. We think that it is not. Yet in several of the opinions the court discussed the effect of the accused's evidence, permitting the inference that he might present a case so strong as to upset the commissioner's finding. Indeed, just this was the result in *United States ex rel. Mayer* v. *Glass*, 25 F. (2d) 941 (C. C. A. 3), though Judge Buffington dissented, perhaps with reason. There is, however, a reconcilement between the possibility in extreme cases of examining the evidence, and the estab-

lished limitations upon the writ; and while it is somewhat refined, it is not casuistical. The accused is entitled to a real consideration of his proof, and can secure it even on habeas corpus. Suppose for example that he could prove by unimpeachable contemporaneous documents that at the time charged he was physically incapable of committing the crime, as for example, that he was in a hospital recovering from an operation. No commissioner who rationally considered such evidence at all, could fail to discharge him. True, on review we should be passing on the cogency of the proof; not however to decide merely that there was no evidence of probable cause, but that the accused had been denied a rational hearing. The two issues no doubt merge in practice, and this may make the decision embarrassing, but it ought not to deprive the accused of his rights. Perhaps in the end this is no more than saying that there may be cases so flagrant that logic must yield; and in any case we need only concede arguendo that that is a possibility. The evidence of the relators was far from demonstrating that the indictment could not be true, or that the commissioner could not have given the relators' proofs an honest and understanding consideration. This is true, even though we disregard the rebuttal, whatever its actual contribution to the result.

We hold therefore that when the accused has had full opportunity to put in his proof and it has been actually considered, he can get no relief on habeas corpus. *Tinsley* v.

Treat, 205 U. S. 20, 27 S. Ct. 430, 51 L. Ed. 689, is not to the contrary; it merely held that he was entitled to his day in court, that is, to a decision based upon the evidence he might present; it had nothing to do with the review of a decision so made. Our decision in *United States ex rel. Brody* v. *Hecht*, 11 F. (2d) 128, was in quite another situation, where, although the accused did not testify, the prosecution supplemented the indictment with evidence which showed that no crime had been committed within the jurisdiction of the court where the indictment was lodged. * * *

The view that a Commissioner's finding of probable cause is not to be interfered with on habeas corpus, unless the accused has demonstrated beyond cavil that this finding is arbitrary or capricious because it is in the teeth of incontrovertible and unimpeachable evidence of innocence, finds clear support in the reasoning employed by this and other courts in numerous decisions.

It must be remembered that the right accorded a defendant to contest removal is not a right conferred by the Constitution. As was said by this Court in *Hughes* v. *Gault*, 271 U. S. 142, 149:

> The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by

> his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime. In *Tinsley* v. *Treat*, 205 U. S. 20, 33, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied "a right secured by statute under the Constitution."[4]

The Court then proceeded to state that because the hardship of removal has grown with the growth of the United States, there has been a natural desire to prevent such hardship when possible, "if a preliminary sifting will show that there is no probable cause for the charge." In consequence R. S. 1014 (*infra*, p. 46) was enacted, which "might have been interpreted as contemplating a summary order without other hearing than was necessary, when there was an indictment, to show that fact and that the person present was the person charged." After pointing out that it had been held that the District Judge on an application to remove acts judicially and that probable cause must be shown, the Court significantly stated as follows:

> * * * It is to be noticed, however, that "where any offender * * * is committed in any district other than that where the offense is to be tried, it shall be the duty

[4] See also page 152.

of the judge of the district where such offender * * * is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal", etc. But the commitment, supposed by these words already to have taken place, is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any "mayor of a city, justice of the peace, or other magistrate, of any State where he may be found." Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding *palpable* injustice. He is not intended to hold a preliminary trial, and, if probable cause is shown on the government side, he is not to set it aside because on the other evidence he believes the defendant innocent. The rule that would apply to a mayor applies to a commissioner of the United States (p. 150). (Italics ours.)

The Court, moreover, said (pp. 151–152):

It is pointed out in *Beavers* v. *Henkel*, 194 U. S. 73, 83, that there are much stronger reasons for caution in surrendering an alleged criminal to a foreign nation than are required before removing a citizen from one place to another within the jurisdiction, yet

> in the latest case on extradition it is said that "*habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extention, whether there was *any* evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez* v. *Phillips,* 268 U. S. 311, 312. So far as the attack upon the order of removal is by *habeas corpus* this would seem to apply. *Price* v. *Henkel,* 216 U. S. 488, 492. (Italics ours.)

In the *Gault case* the relator and his company had been indicted under the Sherman Act and the relator testified before the Commissioner that he and his company were innocent. The Commissioner refused to hear certain confirmatory testimony, but the order of removal was upheld, the Court saying (p. 151):

> * * * On a summary proceeding like this, even if the exclusion was wrong, it would not be enough to invalidate the order of removal, as the Commissioner indicated by his finding that he thought there were substantial grounds for the charge of guilt and that it was not for him to decide whether they were met by the denials of the defendant, even if they seemed convincing. *Collins* v. *Loisel,* 259 U. S. 309, 314, 315.

So far as the opinion in the *Gault case* discloses, no evidence of probable cause was offered by the Government except the indictment.

In *Beavers* v. *Henkel*, 194 U. S. 73, it was contended that in the absence of statutory authority an indictment should not be considered as evidence outside the jurisdiction in which returned (pp. 75–76), but this Court pointed out, quoting from Blackstone, that the presumption is that an indictment has been returned only after the grand jury has found that there was probable cause to believe the defendant guilty of the offense charged and that it should consequently "be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause."[5] That this Court was of the view that it was only in exceptional cases at least that the showing of probable cause implicit in the returning of the indictment by the grand jury, should not be regarded as sufficient is evident from the following language which it used (pp. 84–85):

> The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. [The Court was here referring to the returning of indictment by the grand jury.]

[5] This does not mean, of course, that when the accused is placed on trial in the district in which the indictment was returned, the indictment is there to be considered as evidence. The Court was obviously speaking only of the effect of the indictment as evidence in the preliminary proceedings to bring the accused to trial. See *Fetters* v. *United States*, 283 U. S. 638, 643; *Ex parte United States*, 287 U. S. 241, 250.

> But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere through the United States as at least prima facie evidence of the existence of probable cause. And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had.

With reference to the evidentiary character of the indictment when presented in a removal proceeding, this Court in *Morse* v. *United States*, 267 U. S. 80, 83, said:

> • • • The indictment was before the commissioner simply as evidence for the purpose of establishing or tending to establish the commission of an offense; and the commissioner had authority to pass upon its effect in that aspect only. The court reviewing the action of the commissioner under § 1014 upon *habeas corpus* was gov-

> erned by the same rules and its decision was subject to the same limitation. *Henry* v. *Henkel*, 235 U. S. 219, 230; *Benson* v. *Palmer*, 31 App. D. C. 561, 564–565. Neither had authority to determine the sufficiency of the indictment as a pleading. * * *

See also *Fetters* v. *United States*, 283 U. S. 638, 641, 642.

It is true that in *Tinsley* v. *Treat*, 205 U. S. 20, this Court held that an indictment was not conclusive evidence of probable cause in a removal proceeding and that the defendant was entitled to introduce evidence tending to show that no offense triable in the district to which his removal is sought had been committed, but this is far from saying that if after considering such evidence, the Commissioner and the District Judge upon application for removal should nevertheless find probable cause, this finding may be overturned, except in the extraordinary cases to which the court below referred, merely because another judge on *habeas corpus* or a Circuit Court of Appeals upon an appeal taken in such a proceeding should think from the evidence that a different conclusion should have been reached. That this Court never intended any such result to flow from its decision in the *Tinsley* case is apparent from its concluding remarks in that opinion. The Court said (p. 32):

> Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District

> Judge had thereupon determined that probable cause existed, and such determination could not be revised on *habeas corpus,* it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. * * *

Neither does the *Tinsley* decision, we submit, lend any weight to the view entertained in the decisions relied upon by the petitioner that the indictment vanishes from the case as soon as the defendant introduces evidence tending to show innocence and is thereafter not to be considered by the Commissioner and the District Judge as part of the evidence in determining whether there is probable cause. As was said in *Magnus* v. *Keville,* 6 F. (2d) 157, 158 (C. C. A. 1st).

> While an indictment is not strictly legal evidence of the facts therein charged, nevertheless, in removal proceedings, under section 1014 of the Revised Statutes (Comp. St. § 1674), by custom and long-continued usage it has been treated and held to be evidence of those facts warranting a finding of probable cause if it properly charged a crime against the United States committed within the district to which removal was sought, and the identity of the person charged with crime was shown.

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* The Court is here referring to the judgment of the District Court in the removal proceeding. The application for removal was filed before a District Judge and the *habeas corpus* proceeding was instituted in a Circuit Court.

> In *Hastings* v. *Murchie*, 219 F. 83, 134 C. C. A. 1, the only evidence introduced by the government was that of identity and the indictment found in the district to which removal was sought. There the petitioner had been denied the right to introduce evidence before the commissioner to show that he was not guilty of the offense charged and that there was no probable cause for believing him guilty. In that state of the case we held "there was evidence from which the commissioner could find probable cause for the commitment and detention of the appellant", and said: "Whether this evidence would have been overcome, had the appellant been permitted to introduce the evidence which he offered before the commissioner is entirely problematical; but if he is afforded an opportunity to present the evidence, either before the commissioner or before the District Judge on application for removal, his rights will be fully preserved." *It is evident we there regarded the indictment as evidence of probable cause and not merely as affording a presumption which would disappear as soon as countervailing evidence was offered.* (Italics ours.)

See also quotations from *Hyde* v. *Shine*, 199 U. S. 62, *Price* v. *Henkel*, 216 U. S. 488 at p. 29, *infra*, and discussion of the question in *In re Cravens*, 40 F. (2d) 931, 933–934 (W. D. Mo.).

All that the *Tinsley* case decided, in our view, was that the defendant was entitled to his day in

court in the removal proceeding, i. e., as the court below said, "to a decision based upon the evidence he might present", but if the Commissioner and the District Judge, after considering such evidence, should still find that there is probable cause, we know of no decision by this Court which lends any weight to the view that the accused is entitled on *habeas corpus* to another appraisal of the weight of the evidence. In the *habeas corpus* proceeding the inquiry is simply, as stated in *Hughes* v. *Gault, supra,* whether the finding is "palpably" unjust. Such questions as the guilt or innocence of the defendant or the technical sufficiency of the indictment, if it states a crime, no matter how inartificially, are matters peculiarly for the determination of the demanding court. The *habeas corpus* forum is no place for the solution of such questions. As was said by this Court in the recent case of *Fetters* v. *United States,* 283 U. S. 638, 641–642:

> • • • Doubtful questions of law relating to the sufficiency of the indictment or the validity of the statute upon which the indictment is based, as well as all doubtful questions of fact, are matters to be left for the trial court to determine. *Parker* v. *United States,* 3 F. (2d) 903, 904, and cases cited.

In *Hyde* v. *Shine,* 199 U. S. 62, 84, this Court, in speaking of the scope of review on *habeas corpus* to prevent removal said:

> In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there

> is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the Commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause. *In Re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. * * *[1]

In *Price* v. *Henkel*, 216 U. S. 488, 492, 493, this Court relying upon the rule stated in *Hyde* v. *Shine*, said:

> The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the com-

[1] In this case the contention was made that, pursuant to the requirement of Section 1014 R. S. that proceedings for removal of persons from one district to another shall be "agreeably to the usual mode of process against offenders in [the] State" where the accused is found, the California practice was applicable and that in such State the prisoner had the right to have the court on *habeas corpus* pass upon the weight of the evidence as to probable cause. This Court held, however (pp. 84–85), that the requirement that the usual mode of process adopted in the State shall be pursued refers to the proceedings for the arrest and examination of the accused before the Commissioner, but that it has no bearing upon the subsequent independent proceeding on *habeas corpus*.

missioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of *habeas corpus.* * * *

* * * * *

The evidence independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. * * *

See *Rodman* v. *Pothier,* 264 U. S. 399, 402–403; *Collins* v. *Loisel,* 259 U. S. 309, 314–317; *Rumely* v. *McCarthy,* 250 U. S. 283, 288–289; *Henry* v. *Henkel,* 235 U. S. 219, 228–230; *Peckham* v. *Henkel,* 216 U. S. 483, 487; *Haas* v. *Henkel,* 216 U. S. 462, 475; *Beavers* v. *Haubert,* 198 U. S. 77, 90; *Benson* v. *Henkel,* 198 U. S. 1, 8–9; *Greene* v. *Henkel,* 183 U. S. 249, 259, 260–261; *United States ex rel. Louis* v. *Laubenheimer,* 71 F. (2d) 814, 815 (C. C. A. 7th); *United States ex rel. Maggio* v. *Schneider,* 68 F. (2d) 50, 52 (C. C. A. 3d); *Burton* v. *Smithers,* 31 F. (2d) 966, 968–969 (C. C. A. 4th); *United States ex rel. Haim* v. *Mathues,* 19 F. (2d) 22, 23 (C. C. A. 3d); *Wood* v. *Cooper,* 18 F. (2d) 535, 538 (C. C. A. 8th); *Steeves v. Rodman,* 12 F. (2d) 915, 916 (C. C. A. 1st); *Benson* v. *Palmer,* 31 App. D. C. 561, 563, 569; *United States* v. *Wood,* 26 F. (2d) 908 (N. D. Texas); *United States* v.

Fogel, 22 F. (2d) 823, 825 (Minn.); *United States* v. *Fogel*, 22 F. (2d) 826 (Minn.). See also *South Carolina* v. *Bailey*, 289 U. S. 412, 422; Hardy on Removal of Federal Offenders, p. 78.

If, as we submit, the court below was correct in deciding that it was without authority on *habeas corpus* to overthrow the finding of the Commissioner that there was probable cause in the absence of unimpeachable evidence of innocence, there can be no question that the finding in this case should be upheld. In addition to the *prima facie* case afforded by the indictment, the Government introduced, not only as the court below seemed to think, evidence of identity, but proof that the accused committed at least two of the overt acts charged against him in the indictment, the 16th and 18th (*supra*, p. 4). The witness MacDonnell testified that the petitioner rented a safe deposit box at the St. Augustine National Bank as charged in overt act No. 16, and the witness Zapf testified that the petitioner registered at his hotel at Jacksonville Beach as charged in overt act No. 18 (Summary of Testimony, *infra*, pp. 49–51). It is true as the petitioner says that these places are located 40 and 20 miles, respectively, from Jacksonville, the place in which the conspiracy was to operate, and that the indictment does not specifically state the connection of these overt acts with the conspiracy charged, but the indictment does charge in express language that these overt acts were performed "in pursuance of

said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof" (R. 15). It is easily perceived how or why this might be so, but whether these overt acts were, as charged, performed pursuant to and in furtherance of the objects of the conspiracy was, we submit, a matter for determination at the trial. The failure to allege specifically the exact connection of the overt acts with the conspiracy did not, of course, render the indictment defective, because the omission was susceptible of being supplied by the Government, on order of the trial court, by a bill of particulars if demanded. *Lefkowitz* v. *Schneider*, 51 F. (2d) 685, 687 (C. C. A. 3d Circuit). In that case the court said with reference to a similar contention to that advanced by the petitioner (pp. 687–688):

> The appellants complain that while these pleaded overt acts reveal acts by the four named defendants they fail to show their connection with the conspiracy and particularly they fail to show any connection of the appellants with the conspiracy, and that, in consequence, the indictment is bad under the decision in *United States ex rel. Mayer* v. *Glass, Marshal* * * * 25 F. (2d) 941 [a previous decision by the same court].
>
> The answer is twofold: First, section 37 of the Criminal Code (18 U. S. C. A., § 88) does not require that an overt act shall be

pleaded with respect to each of several alleged conspirators; the statute is satisfied by an averment and proof that "one or more of such parties (did) any act to effect the object of the conspiracy. * * *" And next, this case is distinguished from the *Glass* case where eleven defendants were charged with conspiracy by counts pleading forty-eight overt acts of which at least one was an overt act charged against each defendant and pleaded in a way which showed that the several overt acts pleaded in respect to the several defendants disclosed their whole connection with the conspiracy. That being so we held the averments as to the several defendants must mean what they said and must show that the acts grew out of or had some relation to the conspiracy. Applying that test we held that the indictment charged a crime as to some of them and did not charge a crime as to others. The trouble in the *Glass* case was that the pleader overpleaded his case, that he went further than was necessary as to some defendants and in doing so he was bound by what his averments showed and did not show as to them. In this case there are no averments of overt acts committed in furtherance of the conspiracy by the four appellant-defendants; but as that is not required there are enough overt acts pleaded with respect to other defendants to satisfy the statute, leaving the main body of the counts to charge and hold all defendants for conspiracy. As

> we cannot, from the four overt acts pleaded, see the whole scheme of the conspiracy we cannot say that they are not a part of the conspiracy or that they do not adequately apprise the defendants of the matter charged.

See also *United States ex rel. Maggio* v. *Schneider*, 68 F. (2d) 50, 52 (C. C. A. 3d).*

In this case the indictment makes it clear that the pleader did not, as in the *Glass* case, attempt in his statement of the overt acts to delineate completely the part to be played by each conspirator in the unlawful plan.

While we do not mean to say that there may not be a removal proceeding in which the defendant can show beyond controversy that the overt acts upon which the Government relies have no connection with the conspiracy charged, this is not such a case. The petitioner's attempted explanation of his presence in Florida, coupled with his failure to explain coherently his use of an alias while there, and his denial of any acquaintance or association with Goldberg, were certainly not convincing (see Sum-

* In the case of the petitioner's codefendant, Seeman, whose removal to Florida from New York was upheld by the District Court, the Circuit Court of Appeals and by this Court through the denial of certiorari (see footnote 3, p. 9, *supra*), the District Court held that proof of the 14th overt act (R. 18), which charges that Seeman and another conspirator rented a safe deposit box at the St. Augustine National Bank, was sufficient, when read in connection with the indictment, to show probable cause (see p. 194 of the record in No. 1023, last term).

mary of Testimony, *infra* pp. 55–57, 58, 59). The subsequent death of Fineberg ,with whom the petitioner had the alleged transaction while in Florida, removed from the field the one most able to contradict or corroborate the petitioner's story, and the Commissioner was certainly entitled to consider that fact in judging the truthfulness of the petitioner's explanation of his presence in Florida, especially as Fineberg's wife was also available, but was not introduced.

In addition to his own testimony, the only testimony of any moment introduced by the petitioner was the depositions of five of those implicated in the unlawful plan to misapply the funds of the bank. Petitioner places much reliance upon these depositions, but their probative value, if any, was, we submit, small (Summary of Testimony, *infra* pp. 51–54). The depositions of all of these deponents, except Carr, disclose that they either did not know all the conspirators or that transactions could have taken place in which the other conspirators participated with the petitioner without the knowledge of the particular deponent. If the petitioner, with knowledge that there was a conspiracy on foot, aided any one of the conspirators in the furtherance of the unlawful plan, even though he may not have known the other members of the conspiracy or been known by them, or even if he were unaware of all the details of the plan, he was, it is clear, as guilty as the most prominent member of the conspiracy.

See *Wilson* v. *United States*, 232 U. S. 563, 567; *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Pierce* v. *United States*, 252 U. S. 239, 244; *Coates* v. *United States*, 59 F. (2d) 173, 174 (C. C. A. 9th); *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10th); *Mendelson* v. *United States*, 58 F. (2d) 532 (App. D. C.); *Zottarelli* v. *United States*, 20 F. (2d) 795, 796, 798 (C. C. A. 6th), certiorari denied 275 U. S. 571; *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1st); *Jezewski* v. *United States*, 13 F. (2d) 599, 603 (C. C. A. 6th), certiorari denied 273 U. S. 735.

Carr, while apparently most anxious to help the petitioner, made it impossible to test the credibility of his testimony by resorting, when it appeared that the examination would become embarrassing, to the convenient device of refusing to testify on the ground that it would incriminate him under pending indictments.

In the light of this meagre showing against probable cause, rebuttal testimony does not seem to have been necessary. If the court below was correct in the test to be applied, it certainly cannot be said that the testimony offered by the petitioner against probable cause was of such a character that it could be called unimpeachable.

In any event the Government did not choose to rely solely upon the weakness of the showing against probable cause, but introduced affirma-

tive proof on rebuttal which strengthened its previous showing. In addition to the testimony of Special Agent Main, the admissibility of which is in dispute, it showed by the witness MacDonnell, who was recalled to the stand, that the petitioner was seen to enter the St. Augustine National Bank, where he had a safe-deposit box, in the company of one Goldberg, who also had a box there and whose participation in the conspiracy was made clear by two of the conspirators who gave depositions for the petitioner (Summary of Testimony, *infra*, pp. 58–59). In its opinion the District Court stated that because of the question as to the admissibility of Main's testimony, it had reviewed the evidence in detail, and reached the conclusion that, "the evidence in this case satisfies me that the Commissioner would have been amply justified in making the order of removal even had he not admitted, or disregarded, the testimony of the witness Main" (R. 159).

Not only do we believe that this conclusion of the District Court as to the weight of the evidence was correct, but we submit that even under the rule announced in the two principal cases upon which the petitioner relies (*Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9th); *Meehan* v. *United States*, 11 F. (2d) 847 (C. C. A. 6th), there was sufficient evidence of probable cause. In those cases the rule, as announced in the *Meehan case* (p. 849), which was followed, was that "Wherever there is affirmative proof, unchallenged except by

the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment, the removal should be made." In the instant case the proofs of the petitioner's witnesses designed to show innocence were met by the Government's proof as to the commission by the petitioner of two of the overt acts charged in the indictment and also by the testimony of the witness MacDonnell as to the association of the petitioner with one whose participation in the conspiracy cannot be questioned. This proof of the Goverment, in addition to the indictment, created " substantial doubt ", at least, on the question of probable cause, or was sufficient to do so and may be finally assumed to have done so in the minds of the Commissioner, the District Judge, and the Circuit Court of Appeals.

While we do not believe that the doctrine announced in the *Johnson* and *Meehan* cases is the correct one, the fact that the rule there applied was met by the Government's proof in the instant case, is, we think, made even clearer by the fact situations presented in those cases and by the respective holdings. In the *Meehan* case an indictment charging a violation of the Anti-Trust law was returned against a trade association, a number of member corporations and firms and a number of officers of those corporations. The defendant Meehan was one of those officers. In a proceeding for removal there was introduced against him by the Govern-

ment, in addition to the indictment, a letter from the corporation to the trade association signed by him, which was in furtherance of the unlawful purpose of the association. The court held that under the rule it had announced, there was a sufficient showing of probable cause to permit removal. In the *Johnson* case the defendant was indicted with others for conspiring to violate the National Prohibition Act. Outside of certain evidence on rebuttal, which was held to be incompetent, and certain evidence which was held to have no tendency to show probable cause, the Government introduced no evidence of probable cause except the indictment. While the evidence introduced by the defense did not, we believe, arise to the point of "demonstrating lack of guilt" within the rule announced in the *Meehan* case and reiterated in the *Johnson* case,[9] the court held that it was sufficient to overcome the presumption arising from the indictment, that it then became incumbent upon the Government to offer additional proof tending to show probable cause, and that the Government had utterly failed in this respect.

[9] In the *Johnson* case the only evidence introduced by the defense in addition to the testimony of the defendant to the effect that he was not guilty of the crime charged and testimony of character witnesses, was the testimony of four of the six conspirators that they did not know the defendant in question and had never had any dealings with him. As pointed out at pp. 35–36, *supra*, such evidence is obviously of little, if any, probative value in a conspiracy case.

The situation presented in the *Johnson* case is obviously different from that involved here. Even if the testimony of Agent Main be disregarded, it cannot be said that the Government did not introduce evidence in addition to the indictment tending to show probable cause. As heretofore pointed out, the Government's additional evidence created at least substantial doubt upon the question of probable cause, which under the *Meehan* and *Johnson* cases was sufficient to permit removal. Cf. *Grigg* v. *Bolton*, 53 F. (2d) 158, 160, 161 (C. C. A. 9th); *Ex parte Foo Guey*, 53 F. (2d) 207, 208, (C. C. A. 9th), decisions by the court which decided the *Johnson* case; also *United States* v. *Andrade*, 10 F. (2d) 572, 576–577 (N. D. Texas), one of the cases cited by the petitioner.

We have heretofore chosen to rest our contention that there was probable cause for the removal of the petitioner upon the evidence outside of that given by Agent Main, because of the question raised by the petitioner as to the admissibility of his testimony. This question is discussed in point II *infra*. We believe, however, that the rules of evidence are not as strict in removal proceedings as they are in trials in court and that Main's testimony was competent. If that is so, there can hardly be any question as to the sufficiency of the Government's showing of probable cause. The testimony of Main shows that David N. Chadwick, contrary to his deposition in behalf of the petitioner, had told Main that the petitioner was one of the prime movers in

the conspiracy and was the one instrumental in drawing Chadwick and his brother into the unlawful plan. Main's testimony also shows that, contrary to his deposition, Dickson had told him that the petitioner had taken part in the conspiracy but that he did not know exactly what part he took. The testimony of Main as to the statements of these two witnesses is set forth at length in the Summary of Testimony, *infra*, pp. 59–65. These statements clearly establish the petitioner as one of the conspirators, if not as an actual aider and abetter in the commission of the offenses charged in the substantive counts.

II

THE ERROR, IF ANY, IN THE ADMISSION BY THE COMMISSIONER OF THE TESTIMONY OF SPECIAL AGENT MAIN DOES NOT ENTITLE THE PETITIONER TO HIS DISCHARGE ON HABEAS CORPUS.

The petitioner contends that the testimony of Special Agent Main, as to the statements made by Dickson and David N. Chadwick contrary to their depositions admitted on behalf of the petitioner, was incompetent because these witnesses were not given an opportunity on cross-examination to explain the contradictory statements, and his position apparently is that the admission of this alleged incompetent evidence entitled him to his discharge on habeas corpus.

At the outset it should be pointed out that the contradictory statements made by Dickson and Chadwick were made both before and after the giving of their depositions (Summary of Testimony, pp. 62, 63, *infra*). The argument of the petitioner

here proceeds on the assumption that all the contradictory statements were made prior to the taking of the depositions. It was, of course, obviously impossible for the Government to have cross-examined the deponents at the time their depositions were taken as to the statements made subsequent to the depositions. The usual rule as to the laying of a foundation for the admission of contradictory statements made prior to the testimony sought to be contradicted would not, therefore, seem applicable. Considerations of convenience require that a witness whose testimony it is sought to contradict by prior inconsistent statements be interrogated as to such statements while available, but no such considerations can, of course, apply in the case of a witness who, after he has given his testimony, has made contradictory statements and is not available for examination at the time these statements are sought to be utilized.

As to the contradictory statements made by the deponents prior to their depositions, while it is true that the United States was represented at the taking of these depositions by an Assistant United States Attorney and that he cross-examined the deponents, it should also be stated that, as explained at the removal proceeding, the depositions were not taken either in the demanding district or the district where the petitioner was found, and the United States was represented by an Assistant United States Attorney who was not familiar with the case (R. 120, 129, 146); that the deposition of Chadwick, if not of Dickson, was taken on short

notice (R. 120), and that while Main, the witness who testified as to the contradictory statements, was present at the taking of Dickson's deposition (R. 126), there is nothing in the Record to show that he was present when Chadwick's deposition was taken (R. 120–137).[10] The statements of Chadwick more seriously implicated the petitioner in the conspiracy than did those of Dickson, as Chadwick stated the petitioner was a prime mover in the conspiracy, while Dickson merely said that the petitioner took part in the conspiracy but he did not know what his part was (Summary of Testimony, pp. 60, 62, *infra*).

We do not, of course, dispute the rule generally recognized that in a trial court the former statements of a witness may not be used to contradict his testimony unless he is first given an opportunity to explain such statements. *Ayres* v. *Watson,* 132 U. S. 394, 404; *Mattox* v. *United States,* 156 U. S. 237, 245 et seq.; Jones' Commentaries on Evidence, 2d. Ed., Vol. 6, § 2402.[11] We are, however, here dealing with a proceeding essentially informal in character, and we believe there is sound basis for saying, as did the court below (R. 167), that in such a proceeding "the rules of evidence are slacker than in trials in court." (R. 167.) As was pointed out in the *Gault* case, *supra* (p. 150), R. S. 1014 entrusts proceedings to commit for re-

[10] Chadwick's deposition was taken on October 26, 1933; Dickson's on June 20, 1933.

[11] Wigmore on Evidence indicates, however, that there is some authority for the relaxation of the ordinary rule in the case of depositions (vol. 2, 2d ed., Sec. 1030).

moval not only to judges and commissioners of the United States, and judges of State Courts, but also to any "mayor of a city, justice of the peace, or other magistrate of any State" where the offender may be found. Obviously, a mayor or magistrate, not a lawyer, cannot be expected to be familiar with the technical rules of evidence, and as the Court said in the *Gault* case, he should not be held "to more than avoiding palpable injustice." Including as it does hearings before laymen, "the statute", to use the language of the court below, "cannot aim at more than informal justice, certainly not in full panoply of the common law." In *United States* v. *Greene,* 108 Fed. 816 (S. D. N. Y.), it was said (pp. 819–820):

> The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by the government was received by him; but as stated in the former decision, *the evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial;* and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. * * * (Italics ours.)

See also *United States* v. *Kallas*, 272 Fed. 742, 749 (W. D. Wash.).

But even if the Commissioner should not have admitted and considered the testimony of Agent Main, it is well settled that the reception and consideration of incompetent evidence does not alone afford a basis for release on habeas corpus. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106. If there is any competent evidence to support the finding of the Commissioner, that is all that is required on habeas corpus. *Collins* v. *Loisel*, 259 U. S. 309, 314–315, *supra*; *Hughes* v. *Gault*, 271 U. S. 142, 151, *supra*. Even if the testimony of Agent Main be eliminated, there was, as we have heretofore pointed out, sufficient other evidence in the instant case, the competency of which cannot be questioned, justifying the Commissioner's finding of probable cause.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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MARCH 1935.

APPENDIX A

STATUTES INVOLVED

Section 1014 R. S. (U. S. C., Title 18, Section 591) provides:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

Section 5209 R. S., as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972

(U. S. C., Title 12, Section 592), so far as pertinent, provides:

> Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or who, without authority from the directors of such Federal reserve bank or member bank, issues or puts in circulation any of the notes of such Federal reserve bank or member bank, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; and every receiver of a national banking association who, with like intent to defraud or injure, embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misde-

meanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

Section 37 of the Criminal Code (U. S. C., Title 18, Section 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

APPENDIX B

SUMMARY OF TESTIMONY

To show probable cause the Government introduced a certified copy of the indictment (R. 37–39, 57), and testimony of two witnesses, Augustus O. MacDonnell and Gene Zapf. After MacDonnell had testified that he had been the Vault Custodian at the St. Augustine National Bank at St. Augustine, Florida, for four years and was such in April 1932, he identified two cards. One of these was an agreement to rent a safe deposit box at the bank for a year, signed with the name of Arthur Starke, one of the aliases under which petitioner was named in the indictment. MacDonnell stated that this card was signed in his presence by the lessee and that he placed his signature thereupon as a witness to indicate that the lessee was personally present when he signed the card. The other card was a record of the calls of Arthur Starke at the safe deposit box. It was the custom of the bank for the lessee of a safe deposit box to sign his name upon the record card whenever he visited the box and for the Vault Custodian to place his initials alongside the lessee's signature, and MacDonnell stated that he was present upon each occasion that Starke called at his box.[1]

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[1] The two cards above referred to do not appear in the Record, but from the cross-examination of MacDonnell it appears that the card containing the agreement to lease the

MacDonnell then testified that he was a witness before the grand jury in Florida which returned the instant indictment and proceeded to point out the petitioner as the person known to him as Arthur Starke and as the person with reference to whom he testified before the grand jury. The person pointed out admitted that he was Arthur Kassin, the petitioner. (R. 39–42, 56.)

The Government then placed upon the stand Gene Zapf, who, after testifying that he was then and had been in 1932 the Manager of the Casa Marina Hotel at Jacksonville Beach, Florida, identified a card which showed that Arthur Starke had registered at his hotel on April 24, 1932 (R. 44–45). This card, he stated, was signed by Starke in his presence (R. 45). Zapf then pointed out a man in the hearing room whom he knew as Arthur Starke (R. 45–46). He testified that on the same day the man whom he had pointed out as Starke had approached him in the subway for the purpose of shaking hands (R. 46–47), and that on the preceding day he had identified a picture shown him by an Agent of the Department of Justice as that of Starke (R. 49–50, 51). MacDonnell stated he was with Zapf when Zapf was approached in the subway by Starke and then testified that Starke was the man whom he had previously identified in the courtroom (R. 53). This man, as stated above, admitted upon his identification by MacDonnell that he was Arthur Kassin, the petitioner. Zapf was not a witness before the grand jury (R. 47).

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safe deposit box was signed on April 30, 1932, and that according to the record card, the lessee had visited the box twice on May 2, 1932, once on May 5, 1932, and once on May 9, 1932 (R. 60).

Both MacDonnell and Zapf were cross-examined at considerable length by counsel for the petitioner (R. 42–44, 46, 47–48, 49–52, 53–54, 58–63).

After the Government had rested (R. 57), the petitioner moved to dismiss the case upon the ground that the Government had failed to show probable cause and had failed to prove the identity of the defendant. The Commissioner, however, denied this motion and allowed an exception (R. 63).

For the purpose of attempting to show lack of probable cause the petitioner introduced the depositions of Richard Gillman, David N. Chadwick, Julius L. Chadwick, Leo Carr and John Dickson, all taken pursuant to orders obtained by the petitioner from the District Court for the Southern District of New York (R. 66–67, 89, 146). All of these deponents except Dickson and David N. Chadwick were parties defendant to the indictment in the instant case (R. 13–37).[2]

Gillman was an inmate of the Florida State Penitentiary and had been convicted and sentenced in the Florida State Court in connection with the passing of some of the forged checks, which, according to the indictment in the instant case, were used in misapplying the funds of the Florida National Bank (R. 89–90, 149). All of the other de-

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[2] Gillman was indicted under the name of Joseph Kramer and also under a number of aliases, including that of Richard Gillman (R. 14). He admitted that his correct name was Joseph Kramer (R. 92).

Carr was indicted under the name of Leo Grombecker and also under a number of aliases, including that of Leo Carr (R. 13–14).

ponents were inmates of the Federal Penitentiary at Atlanta, and had either been convicted or pleaded guilty and sentenced under the instant or other indictments for participating in the misapplication of the bank's funds. Dickson, it appears, was the passer of a number of the forged checks (R. 129–130, 138–139, 146, 148).

Gillman and Carr testified that they knew, or were in a position to know, all of those connected with the offenses charged in the indictment, and that the petitioner was not one of those who participated in those offenses (R. 90–91, 139–140).

On cross-examination Gillman admitted, however, that as the result of certain conversations in New York he thought he was going to Florida in connection with a liquor transaction (R. 97), and that he did not know, at least until the time of his arrest, that he was assisting, by the passing of forged checks, in the manipulation of the funds of the Florida National Bank (R. 99, 108); that while he knew Dickson, Carr, and Goldberg, one of the defendants named in the indictment, prior to his arrest, he had not heard of the Chadwicks until after his arrest, and that he had not known before that time that they had any connection with the offenses (R. 99–100).[3]

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[3] Julius L. Chadwick, according to the indictment, was an employee of the Florida National Bank and the "inside man" who was utilized by the conspirators from the inception of the conspiracy to cover up their operations against the bank (R. 13–37). David N. Chadwick was the brother of Julius L. Chadwick and the one who, at the instance of the petitioner, induced Julius Chadwick to enter into the unlawful scheme (pp. 60–61, *infra*).

Gillman also admitted that "There may have been some [transactions] that I wasn't present at" (R. 108).

While Carr was apparently anxious to exonerate the petitioner, his cross-examination was considerably hampered because he refused to answer various questions about the offenses involved, for the reason that there were other indictments pending against him (R. 140–145).[4]

David N. Chadwick in his deposition testified on direct examination, when shown a photograph of the petitioner, that so far as he knew the petitioner was in no wise connected with the conspiracy to defraud the Florida National Bank or the series of forgeries against this bank. He stated that while he was acquainted with most of the individuals participating in these offenses he did not know all of the offenders (R. 129–131). On cross-examination this deponent admitted that he knew a man by the name of Arthur Stern, one of the aliases under which the petitioner was indicted; that he thought he had seen Arthur Stern about February or March 1932 in Florida; that he had seen Arthur Stern in Virginia a considerable period of time prior to that, "it could have been two months; it could have been four; it could have been six", but he did not think it could have been two weeks. When first asked whether Arthur Stern had introduced him to Leo Carr, who pleaded guilty

[4] In a previous attempt by the petitioner several months earlier to examine Carr, he had refused even to testify as to whether he knew the petitioner, or to give any testimony, on the ground that it might tend to incriminate him because of the pendency of the indictment involved in the present case (R. 157–158).

to the indictment (R. 132), the witness stated that he did not recall, but later said that the man whose photograph had been shown to him, the petitioner, was not the man who introduced him to Carr. (R. 134.) He admitted that any one of the one hundred and ten million people in the United States could have been connected with the conspiracy without his knowledge (R. 131–137).

In his deposition, Julius L. Chadwick testified that so far as he knew the petitioner had nothing to do with the series of transactions involved in the indictment. But he admitted that the only conspirators he knew were his brother, David Chadwick, and Carr, that he did not know how many people Carr might have cooperated with, and that he could have cooperated with petitioner without his knowledge (R. 138–139).

John Dickson in his deposition testified that he was familiar "with all of the acts conducted against the Florida National Bank", and that petitioner did not participate in any of them or the arrangements between the individuals concerning these transactions. He admitted that he did not know all of the persons involved in the "commission of this series of crimes." (R. 147.) Dickson stated on cross-examination that the conspirators whom he knew would have taken him into their confidence with reference to any transactions which they had with others. He admitted, however, that they could have had such transactions without his knowledge as he was not with them all of the time (R. 146–156).

Following the introduction of these depositions, the petitioner moved to dismiss the proceeding.

but this motion was denied, the Commissioner saying (R. 67):

> The Government of the United States is assumed not to be acting overzealously. They had a grand jury that indicted this man as part of the conspiracy. If it was larceny or a substantive offense of any kind, and you had made the same showing as you make in this, there may be something in your favor; but this is a conspiracy charge and I cannot see where you have obliterated the probable cause entirely.

It was then stipulated that if certain witnesses were called, they would testify that they knew the reputation of the petitioner for honesty and veracity and that such reputation was excellent (R. 68).

Petitioner then took the stand. While he testified that he was a resident of New York City, he admitted that he was in Florida "three times during the racing season", the first time in January 1932. He apparently went there again in February 1932, and also during the early part of April 1932. The explanation which he gave of his visits to Florida was as follows: He stated that he went to Florida for a vacation during the racing season, starting evidently in January 1932; that he there met a man named Fineberg, who had since died from heart failure (R. 74); that Fineberg told him that he was a resident of Jacksonville and well connected politically in the State; that the two talked about a mint-vending machine; that petitioner heard from Fineberg during the early part of February, Fineberg telling him that he had started a business in St. Augustine, which concerned itself

with mint-vending machines; that the petitioner then went to Jacksonville to see Fineberg; that Fineberg said he was ready to do business; that petitioner told Fineberg that he would do business if Fineberg would put up a like amount of money to buy the machines; that Fineberg said that his money was then tied up and he would like to have some time to arrange to get the money; that there was some discussion with reference to the division of profits, and Fineberg requested further time to think over the matter; that the petitioner heard from Fineberg again about the latter part of March or the beginning of April 1932; that Fineberg wrote him that he should come down again, as he was ready to do business and to put up a like amount of money; that the petitioner went down to Jacksonville, taking with him $2,500.00; that he registered at the Casa Marina Hotel at Jacksonville Beach (R. 44–45) in the name of Arthur Starke, but only stayed there a few days and then went to St. Augustine; that he rented a vault at the St. Augustine National Bank as he felt it was unwise to carry so much money on his person; that Fineberg failed to put up the money and the venture fell through, whereupon petitioner withdrew his money from the bank and left. The petitioner denied that he knew any of the defendants named in the indictment or that he had participated in or had any connection with any of the crimes charged therein. (R. 68–72.)

When asked on cross-examination why he used a fictitious name when he was in Florida, petitioner gave the following enigmatical answer (R. 73):

> * * * A. When I went down to Florida, I didn't have any idea of using a

fictitious name, but being on account I was talking to some people about it, and I told that to Mr. Finberg in reference to the proposition, so I did not want it to get around about the proposition, so he said, "I think you had better use"—it was his suggestion —"use a different name."

Q. You mean because you did not want any people to know that you were down there on that proposition? A. No; that they should not—the people I was speaking to knew that Mr. Finberg was going to be connected with me, and he suggested that I use a different name, so they would not know that I was down there if they wanted to reach me, because of saying to these people that I went down there on my own hook.

Q. It might interfere with this business? A. Yes, sir.[5]

While petitioner stated that although Fineberg was not available because he had died, Fineberg's wife knew the purpose for which the petitioner had been to Florida, and he thought he could get an affidavit from her (R. 74), no such affidavit appears in the Record.

Petitioner's wife testified that she knew the petitioner was in Florida in April 1932, in connec-

[5] When asked by the Commissioner who it was introduced him to Fineberg, petitioner stated that he was introduced by a man named Arthur Harris. While it may be of no particular significance, it is interesting to note that Richard Gillman, a passer of a number of the forged checks (R. 107; cf. R. 148–149, 156), stated in his deposition that when he went down to Florida from New York City in connection with what he supposed was a liquor transaction, he was met by a man named Charles Harris, which he thought was his correct name (R. 97–98, 104); that Harris was the "go-between" between Goldberg and Carr (R. 104).

tion with the distribution of mint-vending machines because she had seen a letter which he had received from Fineberg (R. 74–75).

The petitioner then rested (R. 75) and upon inquiry by the attorney for the United States as to whether the indictment had been sufficiently proved and identity established, the Commissioner replied in the affirmative. The only question which remained open, the Commissioner stated, was that of probable cause (R. 78).

In rebuttal the Government recalled MacDonnell, the Vault Custodian of the St. Augustine National Bank, and also placed upon the stand Roger L. Main, a Special Agent of the Bureau of Investigation of the Department of Justice.

MacDonnell stated that he had testified before the grand jury not only against the petitioner but also against the defendant Goldberg. He was then asked whether he had seen the petitioner in the company of any of the other defendants named in the indictment, and he replied that he had seen him in the company of Goldberg, alias Phillips (R. 79).

He stated that Goldberg, in the name of Phillips, had a safe-deposit box at the bank at the same time that the petitioner did, during April and May 1932; that on one occasion he saw petitioner and Goldberg come into the bank together; that they walked down the lobby of the bank towards the entrance to the safe-deposit vault and Goldberg stopped half way down and sat on a bench in the lobby; that the petitioner went on in to the safe-deposit box, made a deposit, and then went out; that the witness did not notice whether Goldberg and the petitioner left the bank together (R. 78–87).

The testimony of John Dickson indicates that Goldberg was associated with Carr in the furnishing of the forged checks which Dickson and Gillman passed (R. 156; see also R. 146, 152).

The testimony of Gillman, while more evasive with respect to Goldberg's part in the scheme, showed clearly that Goldberg and Carr were associated together (R. 104). In fact, Gillman stated in his testimony that so far as the Government was concerned the one to get was Goldberg (R. 104–105).

After MacDonnell had finished testifying, the petitioner was recalled to the stand and stated that he had never walked into the St. Augustine National Bank with anybody named Goldberg and that he did not know Goldberg (R. 108–109).

Roger L. Main, a Special Agent of the Bureau of Investigation of the Department of Justice, testified (R. 116–128) that he was stationed at Jacksonville, Florida; that he made an investigation of the case against the petitioner, David N. Chadwick and others; that during the course of his investigation he talked with Chadwick; that the first time he talked with Chadwick it was shortly after the middle of June 1932, when Chadwick was removed to Jacksonville from Wilmington, North Carolina; that there was no talk at that time of the petitioner, who was not then known in the case; that several days later Chadwick was again interviewed and at that time admitted knowing two of the defendants but made no reference to the petitioner; that about three weeks later he questioned Chadwick about "a man named Arthur Starke and Arthur Stern"; that Chadwick then stated that this man had only a minor part in the case and that he "did not know

whether he wanted to disclose his identity"; that in October 1932 the witness had another talk with Chadwick and Chadwick stated that he had talked the case over with his lawyer and had decided that he was going to furnish the Government some information on all of those connected with the forgery scheme, and that he was ready to give some information about Arthur Stern and Arthur Starke; that he then said Arthur Starke was the petitioner, and that he would later furnish the petioner's address and give a name under which he had been arrested in New York so a photograph could be obtained; that shortly thereafter he told the witness that the petitioner was one of the prime movers in the forgery scheme; that the petitioner is the man who introduced him to Goldberg and Carr at the George Washington Hotel in Jacksonville; that the petitioner had registered at the George Washington Hotel in Jacksonville under the name of Stern; that on November 25, 1932, Chadwick was again interviewed; that he then stated that the forgery scheme was first brought to his attention at Richmond, Va., by the petitioner, who was at that time using the name of Archie Stone, one of the aliases mentioned in the indictment; that Chadwick stated that he was at the time in difficulty in Richmond; that the petitioner had arranged for his bond, and that the petitioner threatened to go off his bond unless he made his brother, Julius L. Chadwick, who was employed in the Florida National Bank, furnish the name of an account which would stand a forgery scheme and assist in putting across a forgery scheme on that account; that several days later Chadwick gave the witness the petitioner's address in New York

City and said that he knew that petitioner lived there up until June 1932; that a few days later a photograph was displayed to Chadwick, which he immediately identified as that of Archie Kassin, the petitioner; that this was the first direct information the Government had as to the identity of Archie Kassin; that after Chadwick had identified this photograph he elaborated on the petitioner's part in the scheme and stated that the petitioner had instructed him to get a check from his brother on a certain account from the Florida National Bank and to send this check to the petitioner in New York; that Chadwick arranged with his brother to get the check, which was forwarded to New York; that petitioner returned it in about 15 days; and that Chadwick later returned it to his brother in the bank; that later Chadwick was interviewed in the presence of the witness and of other officials of the Department of Justice in Florida, and again related the circumstances under which the petitioner "presented this forgery scheme at Richmond, Virginia, and he related some details as to how he obtained the check from his brother", and forwarded it to petitioner in New York; that Chadwick then appeared before the grand jury which returned the indictment in this case. All of these interviews between the witness and Chadwick took place prior to October 26, 1933, the date when Chadwick's deposition was taken at Atlanta after he had been incarcerated in the Atlanta Penitentiary pursuant to a plea of guilty (R. 122, 129). In this deposition Chadwick had stated that so far as he knew the petitioner was in no wise connected with the conspiracy to defraud the Florida National Bank or the series of

forgeries against this bank. (See pp. 53–54, *supra*.)

The witness also testified that on November 20, 1933 after Chadwick's deposition had been taken, he had a talk with Chadwick at the Atlanta Penitentiary concerning the petitioner's part in the offenses; that Chadwick stated (R. 124):

> he told the truth when he testified before the Grand Jury as to Archie Kassin and all the others in this case, that at this time he was like a crazy man, he did not know what was the matter with him. I asked him what prompted him to make a deposition in the manner in which he did. He said, "Well, I have to be here and I am trying to get some relief for my family", and he said, "This is the only hope I have."

That Chadwick further stated that the Government could still depend on him to testify in the case; and that if he was taken to Jacksonville, "he would truthfully testify as he had told me previously as to Kassin's part in this case"; and that Chadwick told the witness that previous to the making of the denial in his deposition that petitioner had any part in the offenses involved, an attorney by the name of Spector had seen him four or five times (R. 124). Spector was the attorney who represented the petitioner at the taking of Chadwick's deposition (R. 129).

Main also testified that about the latter part of November 1932, or the first part of December 1932, after John Dickson had been removed to Jacksonville from New York, he had a talk with Dickson; that he asked Dickson if he knew the petitioner, and that he said he did; that the witness asked Dickson what part the petitioner had in the forgery

scheme and that the witness stated, "he could not specifically state his part, but he saw Kassin at the Cassa Marina Hotel while he and Gillman were stopping there,"; that Dickson stated that he knew the petitioner was in New York City after he, Dickson, had fled from Jacksonville after the forgery scheme had been discovered because he met the petitioner there several times, and he asked the petitioner to send some money to Gillman to assist him in his defense in the State Court; that Dickson furnished the witness an address in New York City where, he said, the petitioner had an apartment (R. 125–126). This interview took place prior to the taking of Dickson's deposition at Atlanta on June 20, 1933 (R. 145–146). Dickson had stated in this deposition that he was familiar "with all of the acts conducted against the Florida National Bank", and that the petitioner did not participate in any of them or the arrangements between the individuals concerning these transactions. (See p. 54, *supra.*)

The witness also testified that on the same day that Dickson's deposition was taken but after it was taken, he asked Dickson why he had declined to say that he knew the petitioner, and that Dickson said, "Well, I told the truth in Jacksonville and it got me in the penitentiary," and he said, "Why, it won't hurt me to lie a little bit now"; and he would not talk any further (R. 126).

After first making an objection to the admission of any conversation had by Main with Chadwick and Dickson (R. 117), the petitioner moved to strike out all of Main's testimony with reference to the statements inconsistent with his depo-

sition which Chadwick made to Main prior to the taking thereof, on the ground that no proper foundation had been laid by the Government for their admission because it had not cross-examined Chadwick as to them when the deposition was taken. This motion was denied after the Assistant United States Attorney, who was then representing the Government at the removal proceeding, had pointed out that the technical rules of evidence do not apply in such a proceeding and after he had also pointed out that "This deposition was taken in Atlanta, it was taken on short notice, the attorneys in Florida who were familiar with the case were not present, the cross-examination was conducted by an Assistant United States Attorney from Atlanta who was unfamiliar with the case" (R. 119–120). The statements made by Chadwick after his deposition was taken were objected to as incompetent, irrelevant, and immaterial (R. 123), the position of the petitioner with respect to these statements apparently being that the Commissioner was bound by the sworn deposition of Chadwick, and that if the Government wished to introduce these subsequent inconsistent statements, it was its duty to issue a commission to take the deposition of Chadwick (R. 124). The testimony of the witness with reference to the inconsistent statements made by Dickson prior to his deposition was objected to by the petitioner on the ground that they were hearsay and incompetent and that "no proper foundation has been laid for the taking of the deposition of Dickson" (R. 125). Main's testimony as to the statements made by Dickson subsequent to his deposition was not objected to at the time the

testimony was given but after the petitioner's cross-examination of Main, he moved to strike out all of the testimony given by the witness as to Chadwick and Dickson on the ground that it was irrelevant, immaterial, and incompetent and for the reason that "it is an improper method of contradicting and impeaching a witness" (R. 127–128). This motion was denied and an exception allowed (R. 128). The petitioner then moved to strike out all the testimony given by the witness as against both Chadwick and Dickson, which took place prior to the time of the taking of their depositions. This motion was denied and an exception taken (R. 128).

The only other testimony introduced at the hearing was that of an attorney named Irving La-Deutscher, who testified that pursuant to a commission to take the testimony of Jerome Goldberg, who was at that time incarcerated in jail, he went to Florida to see Goldberg but that Goldberg decided, in view of the fact that he was himself awaiting trial in connection with the indictment in the present case, it would not be advisable for him to make a deposition. Although Goldberg told the witness that he had known Kassin for over twenty years and that Kassin had nothing whatsoever to do with the crime, he refused to give a deposition for the reason that if he gave testimony in the case, cross-examination would open the door to his activities and give away his defense in the case (R. 109–115).

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